[fol. 17] [File endorsement omitted]

[fol. 18] IN THE SUPREME COURT OF OHIO

[Title omitted]

MOTION TO STRIKE—Filed Oct. 29, 1943

Now comes the defendant, the Industrial Commission of Ohio, and moves this Court to require the plaintiff to strike from its petition herein, as immaterial, irrelevant and conclusions of law, the following language:

I

The last sentence of the second paragraph of the First Cause of Action (page 2) which reads:

> "The finding in such order that the injury which resulted in decedent's death was not purposely self-inflicted is contrary to the uncontroverted evidence before the Commission and is not supported by any evidence."

II

The second sentence of the first paragraph of the Third Cause of Action (page 3) which reads:

[fol. 19] "The claimant had previously made application for and received and accepted payment of accident disability and surgical expense benefits by reason of the same injuries under a group insurance policy by the terms of which such benefits were not payable if the injuries arose out of or in the course of any employment for wage or profit."

III

The second sentence of the first paragraph of the Fourth Cause of Action (page 4) which reads:

> "The claimant has previously made application for and received and accepted payment of accident disability and surgical expense benefits by reason of the same injuries under a group insurance policy by the terms of which such benefits were not payable if the injuries arose out of or in the course of any employment for wage or profit."

IV

The second sentence of the first paragraph of the Fifth Cause of Action (page 5) which reads:

> "The claimant had previously made application for and received and accepted payment of accident disability and surgical expense benefits by reason of the same injuries under a group insurance policy by terms of which such benefits were not payable if the injuries arose out of or in the course of any employment for wage or profit."

V

The second sentence of the first pararaph of the Sixth Cause of Action (page 6) which reads:

> "The claimant had previously made application for and received and accepted payment of accident disability and surgical expense benefits by reason of the same injuries under a group insurance policy by the terms of which such benefits were not payable if the injuries arose out of or in the course of any employment for wage or profit."

[fol. 20]

VI

The second and third sentences of the paragraph beginning on page 7 which read:

> "The approach of the train for at least 1000 feet before it reached the crossing at which the collision occurred was clearly visible to the driver and occupants of the automobile involved in the collision aforesaid, during the entire distance traveled by them. The passengers in the automobile had called the attention of the driver, Diomataris, to, and warned him of, the approach of the train which was within his view and requested him to stop the car to avoid a collison; but nevertheless, willfully and knowing that a collison would occur if he did not heed the warning and request of his passengers, he proceeded to overtake and pass another automobile which had stopped to permit the train to pass and drove upon the intersection into collision with the train."

VII

The fourth sentence of the paragraph beginning on page 7, which sentence continues on page 8 and reads:

"The hazards at the crossing at which the collision occurred were not greater than those to which the general public were subject and were in no wise created or increased by the employment or by the operation of the plaintiff's plant but were in face much less than the hazards to which the general public was subject, particularly at other railroad crossings on public highways which it would have been necessary for the deceased and injured men to traverse in going to their homes; they were likewise much less than the hazards at crossings of railroads and public highways which it was necessary for men employed at other plants in and near the city of Warren to traverse in going to and from their homes and work."

VIII

The word "unreasonable" in the first line of the first paragraph on page 8.

[fol. 21] IX

Sub-paragraph (c) of the first paragraph beginning on page 8 which reads:

"The findings and orders of the Commission in each of the claims other than the Diomataris claim disregard and are contrary to the admission against interest of each of the claimants, by the sworn allegations in a petition involving the same injuries filed by each of such claimants in the Court of Common Pleas of Trumbull County, Ohio, against the administrator of the estate of the driver, Diomataris, that the driver knew he was driving his automobile toward the railroad crossing, that a train was approaching within his view, that he proceeded to drive around and overtake an automobile immediately preceding him and willfully, wantonly, and recklessly drove his automobile across the railroad although he had been warned and his attention called to said railroad crossing and approaching train and requested to stop his car and avoid a collision, knowing the location of the approaching train and

that collision was inevitable unless he arrested the speed or stopped his car."

X

Sub-paragraphs (d), (f), (g) and (h) on page 9 of the paragraph beginning on page 8 which read:

(d) "The railroad and the road, at the crossing of which the collision causing the injuries and deaths involved herein occurred, had been constructed and were in use long prior to the acquisition by plaintiff of its plant; and the immediate hazards which caused the collision of the train and of the automobile were created by the Baltimore and Ohio Railroad Company and the deceased driver, Isidoros Diomataris.

(f) "The aforesaid orders of the Commission unless vacated, prohibited or enjoined will result in the merit, or individual, rating of the plaintiff's Workmen's Compensation risk to the prejudice of plaintiff, and in unlawfully charging and collecting from the plaintiff premiums therefor in excess of those which should and may legally be charged and collected.

[fols. 22-56] (g) "The aforesaid orders of the Commission, unless vacated, prohibited or enjoined, will deprive the plaintiff of its property without due process of law and will deny it the equal protection of the laws.

(h) "By reason of the foregoing, unless the defendant be prohibited and enjoined from proceeding to make payments under the orders aforesaid, and from taking into consideration any payments made thereunder in the merit, or individual, rating of this plaintiff's Workmen's Compensation risk, and unless such orders be set aside and vacated, this plaintiff will suffer irreparable damage which for it has no other remedy in the ordinary course of law."

XI

All of the prayer of the petition *except* that portion thereof which reads:

"* * * that a writ issue prohibiting and enjoining the defendant from continuing such orders or any of

them in effect, from making any payments thereunder, from taking into consideration any payments which may have been made thereunder in the merit or individual rating of the plaintiff's Workmen's Compensation risk, * * *".

Thomas J. Herbert, Attorney General, Robert E. Hall, Assistant Attorney General, Attorneys for Defendant.

[Brief in support of foregoing motion omitted in printing.]

[fol. 57] IN SUPREME COURT OF OHIO

OPINION SUSTAINING MOTION TREATED AS DEMURRER TO PETITION

(142 O.S. 439)

* Industrial Commission—Appeal to Supreme Court by employer or other party in interest—Section 871-38, General Code—Inapplicable to award of workmen's compensation—Prohibition—Writ not issued to prevent award of workmen's compensation—Mandamus—Discretion not controlled by writ—But performance of duty compelled, where failure due to abuse of discretion.

1. Section 871-38, General Code, which provides that any employer or other person in interest, being dissatisfied with an order of the Industrial Commission, may commence an action in the Supreme Court against the commission to set aside, vacate or amend any such order on the ground that it is unreasonable or unlawful, does not apply to an order allowing a claim for workmen's compensation under power conferred by Section 1465-90, General Code.

2. Prohibition will not issue to prevent the Industrial Commission from carying out a lawful award of workmen's compensation made to a claimant pursuant to Section 1465-90, General Code.

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3. Mandamus will not lie to control the discretion of the Industrial Commission with respect to an award of compensation; but the writ will lie to compel the performance of a duty specially enjoined by law where failure to perform the duty results from abuse of discretion, violation of law or otherwise.

(No. 29746—Decided January 19, 1944)

Appeal from the Industrial Commission

A statement of the case appears in the opinion.

[fol. 58] Mr. Robert G. Day and Mr. E. P. McHugh, Jr., for plaintiff,

Mr. Thomas J. Herbert, attorney general, and Mr. Robert E. Hall, for defendant.

Williams, J. This proceeding is brought originally in this court by the Copperweld Steel Company, an employer complying with the workmen's compensation law. The real object sought by plaintiff is to bring about the disallowance of six claims, heretofore allowed by the Industrial Commission, to prevent the awards thereon from being taken into consideration in determining the merit rating to be applied to plaintiff's risk.

The defendant filed a motion to strike out various parts of the petition, but, in view of statements made by counsel in open court on the presentation of the motion, this court now treats the motion as a general demurrer.

It is not necessary to recite the allegations of the petition in full but only those well-pleaded and germane to this inquiry.

On November 13, 1941, six employees of the plaintiff left its industrial plant near the city of Warren, Ohio, after they had finished their work, entered an automobile and proceeded not less than 700 feet along the roadway to a railway grade crossing where the automobile collided with a freight train. In the collision two of the employees were killed and four injured. As a result thereof two claims for death benefits and four for compensation for injuries were filed with and allowed by the Industrial Commission. After the allowances had been made, the employer, plaintiff herein, filed with the commission a petition as to each claim seeking a vacation of the order of allowance and a dis-

allowance of the claim. The petitions were denied and thereupon this suit was instituted.

* It does not affirmatively appear from the petition whether the employees had other means of egress from the grounds surrounding the plant or whether they had left the zone of their employment. Allegations of such character would be material on the question of compensability, yet as will be pointed out it is immaterial for the purpose of this case whether these claims are in law compensable or not.

The relief sought by plaintiff is rather sweeping. In the prayer of the petition plaintiff asks: (1) That the "orders of the Industrial Commission be set aside, vacated and reversed; that the * * * claims and each of them be disallowed; (2) that a writ issue prohibiting and enjoining the defendant from continuing such orders or any of them in effect, from making any payments thereunder, from taking into consideration any payments which may have been made thereunder in the merit or individual rating of the plaintiff's workmen's compensation risk, and requiring the defendant to vacate such orders and disallow such claims; and (3) for all such further relief to which the plaintiff may be entitled."

[fol. 59] Counsel for plaintiff in their brief and in argument assert that plaintiff is entitled to: (1) a review of the orders of the commission, pursuant to Section 871-38, General Code; or (2) a writ to set aside the orders and compel their disallowance.

The extent to which appeals from orders of the Industrial Commission upon claims for compensation or death benefits may be allowed is provided for in Section 1465-90, General Code. When on rehearing a claim is denied on any ground or grounds specified in that section the claimant is given a right of appeal by filing a petition in the Court of Common Pleas. On the other hand when the claim is allowed the action is final. In that event the complying employer cannot appeal from the order of allowance and the employee * cannot appeal from an order fixing the amount of compensation.

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* 442

Does plaintiff have a remedy by review under Section 871-38, General Code?

That section insofar as material herein reads thus: "Any employer or other person in interest being dissatisfied with any order of the commission may commence an action in the Supreme Court of Ohio, against the commission as defendant to set aside, vacate or amend any such order on the ground that the order is unreasonable or unlawful and the Supreme Court is hereby authorized and vested with exclusive jurisdiction to hear and determine such action. The commission shall be served with summons as in other civil cases."

Counsel for plaintiff request re-examination of our previous construction of that provision. It was early held that an employee could not bring a proceeding under that section for the allowance of compensation in addition to that which had previously been allowed. Gatton v. Industrial Commission, 93 Ohio St., 203, 112 N. E., 503. Recently it was decided that an employer has no right to have an order, fixing a premium rate, reviewed under this provision. United States Wall Paper Co. v. Industrial Commission, 132 Ohio St., 372, 7 N. E. (2d), 798. Since the decision in the Gatton case there have been many other decisions construing this section. It is now the established rule that its provisions do not confer upon this court power to review orders of the Industrial Commission allowing claims for injury or death arising out of or suffered in the course of employment but apply only to matters pertaining to the safety code. Orders reviewable thereunder are such as "relate to places of employment and to safeguards touching the life, health, and safety of employees." Pittsburgh Coal Co. v. Industrial Commission, 108 Ohio St., 185, 188, 140 N. E., 684. United *States Wall Paper Co. v. Industrial Commission, supra. In the two latter reported cases citations to other decisions may be found. Upon re-examination of the question we approve and follow the established rule that orders made by the Industrial Commission under the workmen's compensation law are not reviewable under Section 871-38, General Code.

Is the plaintiff entitled to a writ compelling the setting aside of the awards and disallowance of the claims?

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* 443.

The plaintiff in its petition has not indicated exactly what kind of a writ is sought. It might be either injunction, prohibition or mandamus. Plaintiff's counsel do not specifically urge that injunction will lie but do ask for a writ "enjoining the defendant." Therefore, we give passing consideration to the applicability of the injunctive remedy. This court has power to grant an injunction pendente lite as ancillary to a cause of which it has jurisdiction, in order [fol. 60] to preserve matters in statu quo. However, as to chancery cases in which an injunction is sought as a final remedy, original jurisdiction is vested by statute in the Court of Common Pleas. The Supreme Court has, under the Constitution, no original jurisdiction to afford such relief in chancery.

Counsel for plaintiff do contend that this action is "in prohibition." Prohibition is a remedy calculated to keep inferior tribunals from usurping power with which they have not been invested. It must be borne in mind that it is not sought herein to prevent a merit rating of a complying employer as was the case in State, ex rel. Powhatan Mining Co., v. Industrial Commission, 125 Ohio St., 272, 181 N. E., 99, 82 A. L. R., 938, but to control the action of the Industrial Commission with respect to the allowance or disallowance of certain claims. The power to hear claims and award death benefits and compensation for injuries has been *expressly conferred upon the commission by Section 1465-90, General Code, and prohibition will not lie to curb the exercise of that power or to prevent the enforcement of a valid award after it has been made upon claims properly before it, as were the claims in the case at bar.

Do facts pleaded state a cause of action in mandamus? Mandamus is frequently employed to keep the Industrial Commission within legal bounds. The writ's use is limited to compelling the performance of a duty specially enjoined by law whether the failure to perform the duty results from an abuse of discretion, a violation of law, or otherwise.

The complying employer has no direct financial interest in the distribution of the state insurance fund. His interest lies in basic and merit ratings and the amount he is required to pay in premiums. With respect to the subject matter involved in a proceeding upon a claimant's application for

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* 444.

compensation under Section 1465-90 General Code, the complying employer's interest is remote. He is neither a necessary nor proper party to such a proceeding; not being a party he has no right to appeal or review. The lack of such right, however, does not deprive him of relief through the extraordinary legal remedy of mandamus, when warranted by the facts.

It has previously been stated that it is inconsequential whether the petition alleges facts to show that the claims were in reality compensable. Upon what theory can every complying employer, upon the allowance of a claim by the Industrial Commission, sue out a writ in this court and try the issue of compensability over again? Were this court to issue a writ compelling the Industrial Commission to set aside orders allowing the claims and to enter orders of disallowance, the claimant's right to a rehearing before the commission would be cut off by a prior adjudication in this court. See *State ex rel Nichols v. Gregory et al., Industrial Commission, 130 Ohio St., 165 169, 198 N. E., 182. Thus the result of allowing the writ would be to deny to claimants, who are not parties here, the right to proceed under the express provision of Section 1465-90, General Code, with respect to the determination of their claims. The power to determine compensability is vested in the commission and cannot be interfered with as long as its discretion is exercised soundly and within legal bounds.

Now, the petition does not set up any abuse of discretion on the part of the commission or aver any facts to show that the orders of the commission were void for fraud or [fol. 61] otherwise, or invalid by reason of any statutory provision. No case is made out by the allegations of the petition which would show a right to relief by mandamus.

Since the allegations of the petition do not show a right to a review under Section 871-38, General Code, or a right to a writ as prayed for or other relief, the petition is subject to a general demurrer.

Petition held demurrable.

Weygandt, C. J., Matthias, Hart, Zimmerman, Bell and Turner, JJ., concur.

[fol. 62] [File endorsement omitted.]

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* 445.

[fol. 63] IN THE SUPREME COURT OF OHIO

[Title omitted]

APPLICATION FOR REHEARING—Filed Feb. 1, 1944.

Now comes the plaintiff and makes application for a rehearing, vacation of the entry of January 19, 1944, herein, and that the motion of defendant treated as a demurrer be overruled, for the reasons hereinafter set forth.

The opinion and entry herein state that the allegations of the petition do not show a right to review under General Code §871-38, or other relief; although the court has heretofore recognized that orders of the Commission awarding compensation are final only as to findings of fact and are subject to review where unlawful, unreasonable, discriminatory or arbitrary so as to amount to a gross abuse of discretion or deprive the plaintiff of property without due process of law.

> Slatmeyer v. Industrial Commission, 115 O. S. 654;
> Wallpaper Co. v. Industrial Commission, 132 O. S. 372, 376;
> State ex rel. Slaughter v. Industrial Commission, 132 O. S. 537, 542;
> Coal Co. v. Industrial Commission, 108 O. S. 185, 190.

[fol. 64] In argument upon the motion we have not gone into the merits of the claims for compensation but have confined ourselves to the question of the right of review. For that purpose the petition must be taken as true.

The petition alleges many facts showing that the employes involved in the claims herein had left the plant of the employer and were injured or killed by hazards not created or increased by the employment; that the hazards were in fact less than those to which others of the general public were subject at other crossings; as well as allegations that the injuries and deaths did not arise in the course of, or out of, the employment; that the employment had no casual relation thereto; that the findings and orders were not supported by any evidence but were contrary to the uncontroverted evidence, disregard sworn admissions of record, constitute a gross abuse of discretion, if any, and of the power and authority, of the defendant (contrary to the statement in the next to the last paragraph of the opinion),

are beyond the jurisdiction of defendant, deprive plaintiff of its property without due process and deny it the equal protection of the laws, etc.

The opinion erroneously states (142 O. S. 443) that it is not sought herein to prevent a merit rating of a complying employer—such is indeed the entire purpose of the suit unless an up-rating by the inclusion of unlawful and unreasonable awards in the premiums to be paid by plaintiff may not properly be described by the use of the word "merit."

Can it properly be said that "the complying employer has no direct financial interest in the distribution of the [fol. 65] state insurance fund" (142 O. S. 444) when the Commission in merit rating risks adds the entire amount of all awards distributed in excess of certain quite nominal reserves or allowances to the premiums charged over a five-year period? The employer's financial interest could not be much more direct.

The employer is not a party to proceedings under G. C. 1465-90, but these were not proceedings under that section; the employer was treated as a party before the Commission; and in this court the claimants are all listed as "Interested Parties." Certainly the protection of the Fourteenth Amendment to the Federal Constitution is not conditioned upon the existence of prior legal proceedings to which the person claiming protection was a necessary or proper, and actual formal party.

It is inaccurate to say that the claimant's right to a rehearing before the Commission would be cut off by a prior adjudication in this court if the employer were allowed a right of review of an order of the Commission awarding compensation. The right to rehearing would not be cut off although the result would be determined by the law of the case, just as that principle or the principle of *stare decisis* frequently dictates that a claim be denied, or that a verdict be directed in court. This is not a denial of due process nor does it excuse the denial of due process to the employer.

It is evident from the facts shown that the employes had other means of egress from the grounds surrounding the plant and that they had left the zone of employment. That [fol. 66] of course is a conclusion of law from the facts shown and we are seeking an opportunity to justify that conclusion in a hearing on the merits. Likewise the record

will show that there were other *ways* of egress used by some employes. However, we carefully and expressly limited our argument to the question of the right of review in the interest of orderly procedure and fair coverage of the question involved. Upon a hearing on the merits we are confident of our ability to show that the allowance of the claims involved an extension of the zone of employment theory beyond the farthest limits to which the courts have gone and beyond any justification in the reason for the rules, indeed contrary to the reasoning in the decided cases. The circumstances here are such that the existence of other means, or even ways, of egress is a relatively minor factor.

We submit that the plaintiff is entitled to have the orders of the Commission submitted to the test of reasonableness and lawfulness, which the entry of this court has denied in violation of plaintiff's constitutional rights.

Respectfully submitted, Robert G. Day, Attorney for Plaintiff.

Copies of the foregoing application have been mailed to all counsel for the defendant and for the interested parties January 31, 1944.

Robert G. Day, Attorney for Plaintiff.

[fol. 67] [File endorsement omitted]

IN THE SUPREME COURT OF OHIO

[Title omitted]

AMENDMENT TO PETITION—Filed Feb. 28, 1944

Now comes the plaintiff, Copperweld Steel Company, and by leave of Court to file this amendment to its petition herein incorporates by reference all of the allegations of its petition as though fully repeated herein, and further says that:

At the time of the collision out of which the injuries and deaths resulting in the claims involved herein arose, the men so injured and deceased were traveling to their homes by means freely chosen by them; other means of egress and other ways of egress from the plant of the employer were available to them and were customarily used by other employes of the plaintiff.

The collision, out of which the injuries and deaths resulting in the claims involved herein arose, did not occur during the time or in the place or zone of employment of the injured or deceased men or any of them; nor was such employment the direct or proximate cause thereof.

The defendant, The Industrial Commission of Ohio, has fixed and maintains a manual of basic ("Manual") rates [fol. 68] of premiums charged by it and collected from employers contributing to the State Insurance Fund for various classes of occupations and has likewise established formulae for the merit rating of contributing employers under which such employers by favorable accident experience become entitled to a credit against the basic or manual rates or by unfavorable accident experience become subject to additional penalty charges. The premiums charged to the plaintiff for Workmen's Compensation are assessed upon the basis of such manual rates, principally under Manual 3015, so-called, covering employes in rolling mills.

During the five-year period ended December 31, 1942, (in which the plaintiff was engaged in rolling mill operations only from and after October 21, 1939) the payroll of the plaintiff covered by Manual 3015 aggregated $10,082,517 and that of all employers in the State of Ohio contributing under Manual 3015 was only $11,214,000. The premiums paid by the plaintiff during such period under Manual 3015 aggregated $60,939.00 and those paid by all employers in the State of Ohio under Manual 3015 aggregated only $83,900.00. Consequently, the experience of the plaintiff in the matter of claims affects not only its merit rating but the basic rate under Manual 3015 as well, and is dominant in the determination of such rates. During the first half of the year 1943 the basic rate fixed by the defendant under Manual 3015 was 80¢ for each hundred dollars of payroll of employers covered thereby, but such rate was revised, effective July 1, 1943, to one dollar per hundred dollars of payroll, largely by reason of the claims [fol. 69] involved herein. The accident experience of plaintiff was such that, except for the claims involved herein, the plaintiff would have been entitled to a merit rating credit of 26% of the basic rates established for the last half of the year 1943 in reduction of the basic rates under all operating manuals (i.e., for all classifications except clerical office and traveling salesmen) for the entire

year; but by reason of such claims such merit rating credit was eliminated, the plaintiff was charged and it paid the basic rates for the year 1943, or an aggregate increase in premium of $20,018.62 over what the premium would have been without such claims, and disregarding the effect of such claims in the 25% increase in basic manual rate. Unless the orders of The Industrial Commission in the claims involved herein are vacated and set aside and the defendant required to eliminate them from consideration in determination of premiums to be charged against the plaintiff under the rules and formulae established by the Commission for the fixing of premuims and merit rating, the plaintiff will be charged with large additional amounts by way of increased rates, the exact amount of which is impossible of present determination. The plaintiff therefore has a direct financial interest, to the extent of $20,018.62 plus the amount of all additional premiums based on such claims in future years, in the unreasonable and unlawful allowance of the claims involved herein and the distribution of the State Insurance Fund on account thereof.

[fol. 70] Unless this Court review and vacate, prohibit or enjoin the orders of the defendant or require the defendant to vacate and set the same aside this plaintiff will be deprived of its property without due process of law and will be denied the equal protection of the laws.

Wherefore, plaintiff prays judgment as in its petition set forth.

Robert G. Day, Second National Bldg., Warren, Ohio; E. P. McHugh, Jr., Republic Building, Cleveland, Ohio, Attorneys for Plaintiff.

Duly sworn to by Robert G. Day; jurat omitted in printing.

[fol. 71] [File endorsement omitted.]

[fols. 72-103] IN THE SUPREME COURT OF OHIO

[Title omitted]

DEMURRER—Filed March 13, 1944

Comes now the defendant, The Industrial Commission of Ohio, and demurs to plaintiff's petition and amendment to petition on the following grounds:

1. The petition and the amendment to the petition do not state facts sufficient to constitute a cause of action.

2. The petition and the amendment to the petition improperly join several causes of action.

Thomas J. Herbert, Attorney General; Robert E. Hall, Asst. Attorney General, Attorneys for Deft.

[Brief in support of foregoing demurrer omitted in printing.]

[fol. 104] IN SUPREME COURT OF OHIO

OPINION ON FINAL JUDGMENT

(143 O. S. 591)

Workmen's compensation—Due process or equal protection not denied employer—No statutory right to review order awarding compensation—Employer contending claims not compensable and merit rating affected—Not entitled to relief by extraordinary legal remedy.

1. An employer is not denied due process of law or equal protection of the law by reason of the fact that he is not given a right by statute to review an order of the industrial Commission awarding workmen's compensation to his employees or dependents of his deceased employees.

2. When such an order is challenged only on the ground that the claims allowed are not compensable, the employer whose merit rating will be affected thereby is not entitled to relief by way of extraordinary legal remedy.

(No. 29746—Decided July 19, 1944)

Appeal From the Industrial Commission

On Demurrer to Petition and Amendment to Petition

The facts are stated in the opinion.

[fol. 105] Mr. Robert G. Day and Mr. E. P. McHugh, Jr., for appellant.

Mr. Thomas J. Herbert, attorney general, and Mr. Robert E. Hall, for appellees.

WILLIAMS, J.:

The petition in this case was held demurrable in Copperweld Steel Co. v. Industrial Commission, 142 Ohio St., 439, 52 N.E. (2d), 735, and the substance of the allegations in that pleading may be found in the opinion. Subsequently the plaintiff filed an amendment to the petition. The controlling question is whether the petition and amendment thereto when considered together are subject to a general demurrer. The amendment sets out that at the time of the collision out of which the injuries and deaths resulting in the claims herein arose, the employees, injured and killed in such collision, were traveling to their homes by means freely chosen by themselves, and that other means of egress from the plant of the employer were available to them and were customarily used by other employees of the plaintiff; that the collision did not occur during the time or in the place or zone of their employment; and that in any event the employment was not the direct cause of the injuries and deaths. In addition, the amendment sets out many evidential facts and figures tending to show how the merit rating of the plaintiff has been and will be affected by the allowance of the claims arising from the injury and death of the employees in such collision. The amendment then states that "by reason of such claims such merit rating credit was eliminated, the plaintiff was charged and it paid the basic rates for the year 1943, or an aggregate increase in premium of $20,018.62 over what the premium would have been without such claims, and disregarding the effect of such claims in the 25% increase in basic manual rate."

The amendment concludes with these averments: "The plaintiff therefore has a direct financial interest, to the extent of $20,018.62 plus the amount of all additional premiums based on such claims in future years, in the unreasonable and unlawful allowance of the claims involved herein and the distribution of the state insurance fund on account thereof.

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*592.

"Unless this court review and vacate, prohibit or enjoin the orders of the defendant or require the defendant to vacate and set the same aside this plaintiff will be deprived of its property without due process of law and will be denied the equal protection of the laws.

"Wherefore, plaintiff prays judgment as in its petition set forth."

* Counsel for plaintiff in their brief in opposition to the demurrer make this statement:

[fol. 106] "It was not sought by the amendment to inject a constitutional question, but to set forth beyond cavil the facts from which it is clear that, unless this court review the decisions below, the plaintiff will have been deprived of its property without due process of law and will have been denied the equal protection of the law. This court has clearly and repeatedly held that the decisions of the Industrial Commission are final only upon questions of fact, and to deny a review of questions of law involved in such decisions would be unconstitutional."

It is plain that the plaintiff challenges only the "decisions" of the commission with respect to the compensability of the claims in question. A full discussion of the problem, however, requires us to consider in a measure the question of merit rating under Section 1465-54, paragraph 3 (formerly paragraph 4) General Code.

In State, ex rel, Williams, v. Industrial Commission, 116 Ohio St., 45, 156 N. E., 101, three members of this court voted to sustain the constitutionality of Section 1465-75, General Code, which as then in force provided inter alia for the payment of compensation out of the surplus fund, and four members dissented on the ground that the statute insofar as that provision was concerned, amounted to a denial of due process. Since the votes of six judges are necessary under the Ohio Constitution to declare a law unconstitutional in a cause originating in this court, the statutory provision under consideration was held valid. Since the opinion has no syllabus, Rule VI (see note 94, Ohio St., ix) has no application and the concurring judges are deemed to endorse the pronouncements of law as in a per curiam

* 593.

opinion. With respect to due process, the *language of Judge Jones at page 55, is appropriate here:

"Finally, as a controlling reason why the claim of the employer, that its property is taken without due process, cannot be sustained, is the concession that the state insurance fund does not belong to the employer. Such being the fact, due process is not available to the employer, for his property is not taken. The employer, having paid his premium to the state, has acquired not only insurance, but has also obtained immunity from suit—has obtained his quid pro quo—meanwhile the fund is held in trust by the state, solely for the benefit of injured workmen and their dependents."

In State, ex rel. Powhatan Mining Co., v. Industrial Commission, 125 Ohio St., 272, 181 N. E., 99, 82 A. L. R., 938, a writ of prohibition was sought to prohibit imposing upon the relator a premium rate calculated upon merit and predicated on individual experience. Judge Jones in the opinion used this language, making special reference to the equal protection clause:

"Section 1465-54, paragraph 4 (which provided for merit rating), in our opinion, does no violence either to the federal or state Constitutions by authorizing the commission to apply to individual occupations 'that form of rating system which, in its judgment, is best calculated to merit or individually rate the risk most equitably, predicated upon the basis of its individual industrial accident experience, and to encourage and stimulate accident prevention.' Such a classification is neither unreasonable nor arbitrary; and we think its basis is fully sustained by state and federal courts. * * *

" 'A classification having some reasonable basis does not offend against that clause (the equal protection clause) merely because it is not made with mathematical nicety, or because in practice it results in some inequality.' "

[fol. 107] In considering the question of due process and equal* protection of the laws it is necessary to have in mind that a complying employer is not a necessary or a proper party to the proceeding under Section 1465-90, Gen-

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* 594.

eral Code, for the allowance of compensation. That statute does not provide for his being brought in. His only direct financial interest is, not in the distribution of the fund or in the fund itself, but in the creation of it, that is, in the amount of premiums he pays in the future. Since he has no such interest in the fund or its distribution and is not even a proper party to the proceeding, he is not denied a constitutional right by the allowance of a claim for compensation. He is not aggrieved, if at all, until the commission applies "that form of rating system which, in its judgment, is best calculated to merit or individually rate the risk more equitably, predicated upon the basis of its individual industrial accident experience and to encourage and stimulate accident prevention," pursuant to Section 1465-54, paragraph 3 (formerly paragraph 4), General Code. When action is taken in merit rating, which determines the amount of premium an employer is required to pay, then for the first time his financial interest is affected. True, Section 1465-54, paragraph 3 and kindred sections are silent as to recourse to the courts by an employer in matters relating to merit rating; but since paragraph 3 (formerly 4) has been held constitutional by this court (State, ex rel. Powhatan Mining Co., v. Industrial Commission, supra), and the plaintiff makes no direct attack on its provisions, or on the action of the commission as to merit rating, no further consideration need be given to the question of the constitutionality of such provision.

It is stated in the opinion on the demurrer to the petition (Copperweld Steel Co. v. Industrial Commission, supra) that it is immaterial for the purposes of this case whether the injuries and deaths were compensable or not. It may be remarked in this connec*tion that the facts alleged do not show that the orders of the commission in allowing the claims for compensation were absolutely void but could be at the most merely what is denominated erroneous in judicial procedure. As heretofore indicated, such orders cannot be reviewed by this court at the suit of the employer who was not a party to the proceedings brought by the claimants, and the facts pleaded in the petition and amendment thereto do not entitle the plaintiff herein to relief by way of extraordinary legal remedy.

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This court has not overlooked Section 1465-75, General Code, which provides inter alia for proceedings against the complying employer who defaults "in any payment required to be made by him or it to the state insurance fund." The plaintiff could refuse to pay a premium assessed against it and upon suit to recover the same, make its defense, if any it has. That section has no application to the present case.

The pertinent question which the plaintiff makes other than those regarding constitutionality were fully discussed in the previous opinion in this case and what was there said is applicable here.

For the reasons given, the demurrer to the petition and amendment thereto is sustained, and final judgment entered in favor of the defendant.

Judgment for defendant.

Weygandt, C. J., Natthias, Zimmerman and Turner, JJ., Concur.

Hart and Bell, JJ. dissent.

[fol. 108] DISSENTING OPINION

BELL, J., dissenting:

In stating the reasons for my dissent I shall briefly review this cause from its inception.

The allegations of the original petition call to the attention of the court that the plaintiff, a corporation, *is operating an industrial plant near the city of Warren, Ohio, and is an employer contributing to the State Insurance Fund and otherwise fully complying with the workmen's compensation law of Ohio. On November 12, 1941, among the workmen employed by plaintiff were Isidoros Diomataris, Leonidas Serres, Costas Perris, Markos Mamoujelos, Antionos Spanolios and Tom Russ.

On the night of that day these six men worked at the plant and on the next morning after they had finished they left the plant and entered an automobile driven by Isidoros Diomataris.

They proceeded some distance over a roadway to a grade crossing on land owned by the Baltimore & Ohio Railroad Company at which time and place the automobile and a freight train proceeding over the crossing came into colli-

* 597

sion causing the death of the first two named employees and injuring the remaining four.

A claim was filed by or on behalf of each of such employees with the Industrial Commission (hereinafter called the commission) and on June 11, 1943, the commission entered an order in each cause finding that the claimant was entitled to participate in the State Insurance Fund. Plaintiff was notified of the findings and orders and thereafter filed a petition with the commission for rehearing and reconsideration of the claims and orders. Upon rehearing the commission again entered its orders allowing the claims. The plaintiff alleges in detail the facts with reference to the collision between the automobile and the train, and also reasons why the claims should have been rejected.

The prayer, in brief, is that the orders be set aside, vacated and reversed and that the claims be disallowed, that a writ issue prohibiting and enjoining the commission from continuing such orders in effect or making payments thereunder and from taking into consideration any payments made thereunder in the merit *or individual rating of the plaintiff's workmen's compensation risk.

To this petition the commission (defendant) filed a general demurrer.

In *Copperweld Steel Co.* v. *Industrial Commission*, 142 Ohio St., 439, by a unanimous decision, this court held that the petition was demurrable upon the ground that the Workmen's Compensation Act does not grant the employer the right to review of an order made by the commission awarding compensation to an injured employee.

Thereafter plaintiff filed an amendment to the petition in which it is alleged that the commission assessed and the plaintiff paid for the year 1943 an aggregate increase in premium of $20,182.62 over the amount the premium would have been without such claims and that plaintiff will be charged with additional amounts by way of increased premiums in future years based upon the allowance of such claims.

[fol. 109] The commission again has demurred upon two grounds, (1) that the petition and the amendment thereto do not state facts sufficient to constitute a cause of action, and (2) that several causes of action are improperly joined.

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The majority of the court has concluded that the demurrer to the petition and the amendment should be sustained and the petition dismissed.

With that conclusion I am unable to agree.

Under the provisions of the Workmen's Compensation Act every employer who employs three or more persons regularly in the same business is amenable to the act and complying employers are protected against actions at law for damages for death or injury to employees sustained in the course of their employment. The employee is guaranteed compensation for any injury sustained in the course of and arising out of his employment and the dependents of an employee, in *case death ensues, under like circumstances are granted compensation. The act further provides that employers amenable thereto, with the approval of the commission, may become self-insurers. All employers, therefore, who employ three or more persons regularly in the same business, of necessity fall within one of three classifications. (1) Complying employers; (2) non-complying employers; or (3) self-insurers. The first class pays premiums into the State Insurance Fund, the latter two classes do not.

The commission fixes the amount of the premium that complying employers must pay into the fund based upon the classification of the business and the amount of losses incurred against the fund on account of injuries and death of the employees of such employer. It follows that the greater the number of compensable deaths or injuries occurring during any one year the greater the amount of premiums payable by the employer.

In my view of this case two constitutional questions must be considered. (1) Is the complying employer being deprived of his property without due process of law? (2) Is the complying employer being granted the equal protection of the law?

Let us briefly analyze what happens to each class of employers when an employee is killed or injured.

Class No. 1 Complying Employers—Where an employee of a complying employer is killed or injured claim is made to the commission and if an award is granted compensation is paid out of the State Insurance Fund. The employer

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has no voice in the matter. There is no forum wherein such complying employer can set up the defense that the injury or death did not occur in or arise out of the employment even though that be the fact.

By the provisions of the statute every award granted by the commission results in an increase in the *premium which the complying employer must pay for the ensuing years. [fol. 110] The net result is that whether an award is rightfully or wrongfully made the complying employer cannot be heard to complain.

Class No. 2 Non-complying Employers—Where an employee of a non-complying employer is killed or injured the employee or in case of death his dependents have a choice of remedies. A civil action may be maintained for such death or injury against such employer or application may be made to the commission, and it may make an award and certify the same to the Attorney General who shall institute a civil action against such employer to compel payment. However, in either event, the non-complying employer may defend any action brought against him upon the ground that the death or injury did not occur in the course of or arise out of the employment. If such defense be established the non-complying employer is not required to pay for the death or injury of such employee.

Class No. 3 Self-Insurers.—When an employee of such self-insurer is killed or injured, application is filed with the commission by the injured employee or by his dependents in case death ensues and, if an award is granted, the employer, if an action be instituted to compel payment of the award, may defend upon the ground that the death or injury did not occur in or arise out of the employment.

It is self-evident that the non-complying and self-insuring employers before being compelled to pay any award or damages have the legal right to have determined the question as to whether the injury or death occurred in or arose out of the employment. The complying employer has no such right. This court has held frequently that a complying employer has no right to review an order of the commission awarding compensation.

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* It is a matter of such common knowledge that judicial notice should be taken of the fact that the commission considers thousands of claims each year and like all human agencies undoubtedly it makes mistakes. In some cases claims are allowed that should be rejected and some persons are compensated who should not receive compensation. In cases where awards are erroneously granted by the commission it is neither just nor equitable that the complying employer be required to pay extra premiums on account thereof. Requiring such payments results in penalizing the complying employer by placing him upon a different basis than the self-insurer or the non-complying employer.

In this case the court goes a step further and decides, in effect, that even though the employer is compelled to pay large sums of money in additional premiums for a period of years by reason of erroneous awards of compensation made by the commission, still the complying employer cannot maintain an action to prohibit the commission from assessing and collecting such additional premiums.

If the complying employer has no remedy the assessment and collection of premiums based upon awards granted by the commission to a claimant not entitled thereto amounts to the taking of such employer's property without due process of law.

[fol. 111] This court has never squarely decided whether the complying employer has a remedy. It would seem from one statement in the majority opinion that the remedy of the complying employer under such circumstances is to refuse to pay the premium assessed by the commission and when suit is instituted to collect such premium the complying employer may make a defense if he has one.

If that be his exclusive remedy then in my judgment the complying employer is not afforded the equal protection of the law.*

* Section 1465-75, General Code, provides in part:

"If any employer who has complied with this act shall default in any payment required to be made by him or it to the state insurance fund for a period of ten days after notice that such payment is due, the same proceedings may

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be had as in the case of an employer against whom the commission has made a finding as hereinbefore provided."

Without quoting in detail all the provisions of the statute, suffice it to say that after the commission has determined the amount owed to the fund and notified the employer thereof such amount so determined shall be paid within ten days and upon failure so to do the commission shall certify the finding to the Attorney General who shall "forthwith institute a civil action against the employer." Such employer is granted ten days to answer and to execute a bond *in double the amount claimed*, with sureties satisfactory to the commission, conditioned that he or it will pay any judgment and costs rendered against him or it for such premiums and upon failure to give such bond it becomes the mandatory duty of the court to appoint a receiver to take charge of the employer's business.

If the employer is relegated to that remedy his cause is lost as soon as suit is instituted for the reason that he could not claim that he did not owe at least a part of the assessed premium.

In the majority opinion it is said that Section 1465-75, General Code, has no application to the present case. If the complying employer in this case had refused to pay the premium as fixed by the commission and an action had been instituted to require the payment thereof that section by its very language would certainly be applicable.

In addition thereto if the employer had failed to pay the premium the corporation, its president, secretary, general manager or managing agent, each would be personally subject to fine and imprisonment (Section 1465-69a, General Code) and the corporation if sued by some injured employee during the period of non-compliance would be barred of all common-law defenses. To require the complying employer to undergo those hazards in order to review the correctness of an award made by the commission, none of which is required of a self-insurer, does not afford the complying employer equal protection of the law, nor does it afford him a remedy in the ordinary course of the law.

The functions of the commission in granting awards to claimants and in fixing premium ratings are *quasi*-judicial. We have held upon numerous occasions that a writ of prohi- [fols. 112-113] bition is the appropriate remedy to keep administration tribunals within the limits of their jurisdic-

tion. See *State, ex rel. Arey v. Sherrill, City Manager*, 142 Ohio St., 574, 53 N. E. (2d), 501, and cases cited therein.

In the instant case all of the facts being admitted by the demurrer, upon those admitted facts, the commission was without jurisdiction or authority to grant any award of compensation to any of the six claimants and after having done so, it was without jurisdiction or authority to consider such awards in fixing the premium for the ensuing years thereby increasing such premiums.

In my opinion the petition and the amendment thereto state facts sufficient to entitle the plaintiff to relief by this court if the allegations thereof be sustained by proof.

As to the second ground of the demurrer all of the claims grew out of one accident and the allowance of those claims was the basis of the increase in the amount of premiums, and therefore there is no misjoinder of causes of action.

The demurrer therefore should be overruled.

Hart, J., Concurs in the foregoing dissenting opinion."

[fol. 114] Bond on Appeal for $1,000.00 approved and filed October 13, 1944, omitted in printing.

[fols. 115-117] [File endorsement omitted]

[fol. 118] IN THE SUPREME COURT OF OHIO

[Title omitted]

PETITION FOR APPEAL—Filed October 13, 1944

To the Honorable Carl V. Weygandt, Chief Justice of the Supreme Court of the State of Ohio:

Now comes the appellant, Copperweld Steel Company, a corporation, and for its petition for appeal to the Supreme Court of the United States, respectfully shows that:

On the 19th day of July, 1944, final judgment was rendered in the above entitled cause by the Supreme Court of the State of Ohio, the highest Court in said state, against appellant, Plaintiff therein, and in favor of the Industrial Commission of Ohio, Defendant therein, sustaining a demurrer of the Defendant to the petition and amendment

thereto and entering final judgment in favor of the Defendant.

In this suit there was drawn in question the validity of a statute of the State of Ohio commonly known as the Workmen's Compensation Act set forth in the General Code ("G. C.") §§ 1465-37 to 1465-112 inclusive, providing among [fol. 119] other things that the decisions of the Industrial Commission upon claims for workmen's compensation on account of injuries or death of employees shall be final, except that claimants may appeal from denial of such claims on grounds stated therein (G. C. § 1465-90; 120 O. L., S. 159, § 1).

The Workmen's Compensation Act further provides:

(a) For the creation of a state liability board of awards (G. C. § 1465-37) superseded by the Industrial Commission of Ohio (G. C. § 871-12; 103 O. L. 97, § 12);

(b) For the classification by the Industrial Commission of occupations or industries with respect to hazards, the determination of risks and fixing of rates of premium for the different classes, based on payroll or such other basis as the Commission may determine, to provide and maintain a state insurance fund adequate for workmen's compensation provided in the act (G. C. § 1465-53);

(c) For the fixing of rates of premium, to provide a solvent state insurance fund and surplus and granting the Industrial Commission power to apply that form of rating system in its judgment best calculated to merit or individually rate the risk more equitably, predicated upon the basis of individual industrial accident experience (G. C. § 1465-54);

(d) For the compulsory payment semi-annually by employers subject to the Act of premiums for workmen's compensation determined by the classifications, rules and rates made and published by the Commission, except as to those employers who qualify and elect to pay compensation direct and are only required to pay such portion of the premiums otherwise payable as are required to be credited to the surplus (G. C. § 1465-69);

(e) That employers complying with the act shall not be liable for damages at common law or by statute for

injuries or deaths of employes occurring during the period covered by the premiums paid or qualification for self-insurance (G. C. § 1465-70);

(f) For payment from the state insurance fund or by self-insuring employers direct to employes injured in the course of, and arising out of, their employment [fol. 120] and to their dependents in case death has ensued (G. C. § 1465-68, 1465-72);

(g) That any employe whose employer has failed to comply with the act who has been injured in the course of employment, or his dependents in case of death, may file application for and be awarded compensation; that any employe of a self-insuring employer may, in event of failure of his employer to pay compensation, file application with like effect; and for collection of any award in either case by civil action instituted by the attorney general of the state (G. C. § 1465-74). The Supreme Court of Ohio has construed this section of the statute as permitting non-complying and self-insuring employers to contest the validity of any such award on any legal ground (including the ground that the injury or death did not arise in the course or out of the employment) by way of defense in the action for collection of such awards;

(h) That if any employer who has complied with the Act shall default in any required payment to the state insurance fund for a period of ten days after notice that payment is due, the Commission shall certify its finding to the Attorney General who shall forthwith institute a civil action against the employer and unless the employer within ten days execute bond to the state in double the amount claimed, the Court shall appoint a receiver of the employer's business (G. C. § 1465-75); the corporation, its president, secretary, general manager or managing agent will be personally subject to fine and imprisonment (G. C. § 1465-69 a) and the corporation, in case of injury to an employe or ensuing death is not entitled to the benefits of the Act but may be sued, and in such case, barred of the common law defenses of the fellow-servant rule, assumption of risk, and contributory negligence (G. C. § 1465-73).

Likewise there were drawn in question in this suit the right, privilege and immunity of appellant under §1 of the Fourteenth Amendment to the Federal Constitution that it be not deprived of its property without due process of law nor denied the equal protection of the laws, by any action of the State.

By its decision and judgment aforesaid the Supreme Court of Ohio held that the Workmen's Compensation Act is valid and not repugnant to Section 1 of the Fourteenth [fol. 121] Amendment to the Federal Constitution and that the appellant was not deprived of its property without due process of law or denied the equal protection of the laws by such statute, the orders of the Industrial Commission, or the action of this Court, although:

(a) The Supreme Court of Ohio thereby held that appellant is not entitled to judicial hearing upon, review of, prohibition or other relief against six several orders of the Industrial Commission of Ohio awarding workmen's compensation payable from the state insurance fund on account of injuries and deaths of employes of appellant, an employer contributing to the state insurance fund under the Workmen's Compensation Act of Ohio, which orders and awards were unreasonable and unlawful and were entered in gross abuse of discretion, if any, and of the power and authority of the Industrial Commission and were beyond its jurisdiction, for the reason that the injuries and deaths involved were not occasioned in the course of, and did not arise out of, the employment and were, therefore, not compensable; the findings of the Commission to the contrary not being supported by any evidence but being contrary to the uncontroverted evidence before the Commission.

(b) Appellant will be charged and required to pay over a period of five years large additional amounts by way of increased premiums for workmen's compensation, the exact amount of which is presently impossible of ascertainment but aggregated $20,018.62 for the year 1943, by the inclusion of such claims in the basis of computation of the premium rates charged the appellant, and thereby the appellant has been and will be deprived of its property without due process of law.

(c) The Supreme Court of Ohio has repeatedly held that orders of the Industrial Commission awarding workmen's compensation are reviewable, or subject to attack upon any legal ground, e. g. that the injury was not occasioned in the course of or did not arise out of the employment, where the award is not payable from the state insurance fund, by defense in a suit (under G. C. § 1465-74) for collection of the award in the case of (1) self-insured employers, (2) non-complying employers and (3) employers against whom additional awards are made for injuries, disease or death because of the failure of compliance with a lawful safety [fol. 122] requirement; and appellant has, therefore, been denied the equal protection of the laws.

Appellant presents herewith an Assignment of Errors and a Statement in Support of Jurisdiction on appeal.

Appellant has heretofore procured an order staying and suspending execution of the judgment of this Court and of orders of the Industrial Commission involved therein until October 19, 1944 and thereafter until any application for certiorari and any appeal be determined by the Supreme Court of the United States, and has filed and procured approval of a bond in the penal sum of $1,000.00 therefor.

Wherefore, appellant prays the allowance of an appeal from the judgment of the Supreme Court of the State of Ohio to the Supreme Court of the United States; that the appeal operate as a supersedeas without additional bond; that the record be removed to the Supreme Court of the United States; that the errors complained of be reviewed and corrected; that the judgment be reversed; and for such other relief as may be proper in the premises.

Robert G. Day, Attorney for Appellant.

Frank R. S. Kaplan, E. P. McHugh, Jr., Hoppe, Day & Ford, of Counsel.

[fol. 123] IN THE SUPREME COURT OF OHIO

[Title omitted]

ASSIGNMENT OF ERRORS—Filed October 13, 1944

Copperweld Steel Company, appellant herein, assigns the following errors in the record and proceedings of the Supreme Court of Ohio in said case:

(1) The Court erred in holding valid and not repugnant to Section 1 of the Fourteenth Amendment to the Federal Constitution the provision of the Workmen's Compensation Act (G. C. § 1465-90) that the decisions of the Industrial Commission upon claims for workmen's compensation on account of injuries and deaths of employes shall be final except that claimants may appeal from denial of such claims on grounds stated therein;

(2) The Court erred in holding that §871-38 of the General Code of Ohio, providing that any employer or other person in interest being dissatisfied with any order of the Industrial Commission may commence an action in the Supreme Court against the Commission to set aside, vacate or amend any such order on the ground that it is unreasonable or unlawful, does not apply to orders allowing claims for workmen's compensation under § 1465-90 of the General Code;

(3) The Court erred in holding that when an order of the Industrial Commission awarding workmen's compensation is challenged on the ground that the injuries or death for which claims are allowed are not compensable, employers contributing to the state insurance fund, whose premiums will be increased thereby, are not entitled to relief by way of extraordinary remedy;

[fol. 124] (4) The Court erred in holding that appellant, an employer contributing to the state insurance fund, is not deprived of property without due process of law by the court's construction and application of G. C. §§ 1465-90 and 871-38, and by its holding that appellant is not entitled to judicial hearing on, review of, prohibition, mandamus or other relief against such orders; although under the rules and system adopted

by the Commission for the classification of occupations and industries and the determination of risks and rates, the premiums charged and required to be paid by appellant for workmen's compensation over a period of five years will be thereby greatly increased, to an extent not presently ascertainable but amounting to $20,018.62 for the year 1943;

(5) The Court erred in holding that appellant, an employer contributing to the state insurance fund, is not denied the equal protection of the laws by the denial of any judicial hearing on, review of, prohibition, mandamus or other relief against orders of the Industrial Commission awarding workmen's compensation for injuries and deaths which are not legally compensable; although employers against whom awards are made for the payment of workmen's compensation otherwise than from the state insurance fund (self-insuring employers and employers who in violation of law are non-complying) may attack the legality of such orders by setting up any defense other than a question of fact in a suit for the collection of such awards under the Workmen's Compensation Act (G. C. § 1465-74);

(6) The Court erred in holding that the appellant has no direct financial interest in the distribution of the state insurance fund, although by the allowance of claims for injuries and deaths which are not compensable and the payment of such awards from the state insurance fund, premiums charged and required to be paid by appellant for workmen's compensation will be greatly increased, to an extent not presently ascertainable but amounting to $20,018.62 for the year 1943.

(7) The Court erred in its final judgment of July 19, 1944 sustaining the general demurrer to the petition and amendment thereto and entering judgment for the appellee;

(8) The State of Ohio, by the Workmen's Compensation Act, the decision and judgments of the Court, and the orders of the Commission involved herein, has [fol. 125] deprived appellant of property without due

process of law and has denied it the equal protection of the laws.

Wherefore, appellant prays that the judgment of the Supreme Court of Ohio be reversed; that judgment be rendered in favor of appellant; and for such other relief as may be proper in the premises.

Robert G. Day, Attorney for Appellant.

Frank R. S. Kaplan, E. P. McHugh, Jr., Hoppe, Day & Ford, of counsel.

[fol. 126] IN THE SUPREME COURT OF OHIO

[Title omitted]

ORDER ALLOWING APPEAL—Filed October 13, 1944

This day this cause came on to be heard upon the petition of Copperweld Steel Company, plaintiff and appellant, for appeal to the Supreme Court of the United States from the final judgment entered in the above entitled suit by the Supreme Court of the State of Ohio on July 19, 1944 and upon the assignments of error and jurisdictional statement filed therewith; and upon consideration thereof it is Ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from the Supreme Court of Ohio as prayed for in said petition; that the Clerk of the Supreme Court of Ohio shall prepare and certify a transcript of the record and proceedings in the above entitled suit and transmit the same to the Supreme Court of the United States within forty (40) days from the date hereof.

And the appellant having heretofore presented to a Judge of this Court its notice of appeal and application [fol. 127] for stay of execution and having procured an order staying and suspending execution and enforcement of the judgment of this Court and of the orders of the Industrial Commission involved in this cause for a period of three months following July 19, 1944 and thereafter until an applicatoin for certiorari and any appeal be determined by the Supreme Court of the United States;

and having filed and procured approval by a Judge of this Court of a bond therefor in the penal sum of $1,000.00 with Fidelity and Deposit Company of Maryland as surety which bond is sufficient for costs and supersedeas on this appeal, it is Ordered that such bond be and it is hereby accepted, approved and continued in effect as though now for the first time presented, accepted and approved; and that the appeal herein shall operate as a supersedeas and suspension of the judgment of this Court and of the orders of the Industrial Commission involved in this cause until this appeal and any application for a writ of certeriorari be determined by the Supreme Court of the United States.

Dated Oct. 13, 1944.

Carl V. Weygandt, Chief Justice of the Supreme Court of the State of Ohio.

[fol. 128] Citation in usual form showing service on Thomas J. Herbert, filed Oct. 17, 1944, omitted in printing.

[fol. 129] IN THE SUPREME COURT OF OHIO, JANUARY TERM, 1943

29746

Title of Case

COPPERWELD STEEL COMPANY, Warren, Ohio

vs.

THE INDUSTRIAL COMMISSION OF OHIO, Consisting of Will T. Blake, James A. White, and G. L. Coffinberry

Action: Appeal from The Industrial Commission of Ohio

Attorneys: Robert G. Day, Second Nat'l. Bank Bldg., Warren, Ohio; E. P. McHugh, Jr., Republic Bldg., Cleveland, Ohio; Thomas J. Herbert, Attorney General.

Memoranda of Pleadings, &c filed, Writs Issued, &c.

DOCKET ENTRIES

Sept. 4, 1943	Petition in prohibition with praecipe for summons filed.
Sept. 4, 1943	Summons in Prohibition issued to Sheriff of Franklin County, service to be made on defendant, sent by registered mail and returnable Sept. 13, 1943. (Rec. #23080)
Sept. 15, 1943	Summons in prohibition returned and filed endorsed: "Received this Writ Sept. 7, 1943 at 9:00 o'clock A. M. and pursuant to its command on the 8th day of September, 1943, I served the within named The Industrial Commission of the State of Ohio, by serving Will T. Blake, Chairman of said The Industrial Commission of the State of Ohio, by personally handing to him a true and cer- [fol. 130] tified copy of this writ with all the endorsements thereon. Jacob E. Sandusky, Sheriff of Franklin County, Ohio. L. Hurd, Deputy. Sheriff's Fees $1.17.

Sept. 30, 1943	Application for extension of time to plead herein filed.
Sept. 30, 1943	Entry extending time for pleading herein to October 30, 1943. J 37—275
Oct. 29, 1943	Motion by defendant to strike and brief in support of motion filed.
Nov. 5, 1943	Proof of Service filed.
Nov. 12, 1943	Leave to file plaintiff's brief on or before Nov. 27, 1943 filed.
Nov. 27, 1943	Printed brief of plaintiff opposing motion to strike and proof of service filed.
Jan. 19, 1944	Motion by defendant to strike out various parts from petition. Petition held demurrable. Twenty days allowed to plead further. J 37—368
Feb. 1, 1944	Application for rehearing filed.
Feb. 9, 1944	Rehearing denied. Twenty days allowed to plead from this date. J 37—386
Feb. 28, 1944	Amendment to petition filed.
March 13, 1944	Demurrer to Amendment to Petition and brief in support of demurrer filed.
March 16, 1944	Proof of Service filed.
March 28, 1944	Entry extending time for filing plaintiff's brief opposing demurrer herein to April 11, 1944. J 37—422
March 30, 1944	Proof of Service of demurrer and brief filed.
March 31, 1944	Printed brief opposing demurrer filed and proof of service filed.
[fol. 131]	
July 19, 1944	Demurrer to petition and amendment thereto sustained and final judgment for defendants. J 37—498
July 26, 1944	Certified copy of entry sent to Industrial Commission.
Aug. 7, 1944	Notice of Appeal and application for stay of Execution filed.
Aug. 7, 1944	Entry granting application for stay of execution upon giving bond in the sum of $1,000.00. J 37—511
Aug. 7, 1944	Bond in sum of $1,000.00, Fidelity & Deposit Co. of Maryland, as Surety, approved and filed.

Oct. 13, 1944	Petition for appeal filed.
Oct. 13, 1944	Order allowing appeal filed.
Oct. 13, 1944	Assignments of Error filed.
Oct. 13, 1944	Statement of appellant in support of jurisdiction in United States Supreme Court filed.
Oct. 13, 1944	Citation issued.
Oct. 13, 1944	Bond in sum of $1000.00 Fidelity & Deposit Co. of Maryland, as surety, approved and filed.
Oct. 17, 1944	Citation returned and filed.
Oct. 17, 1944	Proof of service as required by Rule 12, Paragraph 3, filed.
Oct. 17, 1944	Stipulation for Transcript of Record filed.
Oct. 30, 1944	Statement Opposing Jurisdiction and Motion to Dismiss or Affirm filed.
Nov. 6, 1944	Proof of Service of Statement Opposing Jurisdiction filed.

[fol. 132] IN SUPREME COURT OF OHIO

Journal Entries

ORDER SUSTAINING MOTION TREATED AS DEMURRER TO PETITION

29746

Wednesday, January 19, 1944.

Motion by appellee to strike from the petition in Prohibition.

Appeal from The Industrial Commission.

This cause came on to be heard upon the motion of defendant to strike out various parts from the petition and was argued by counsel. On consideration whereof it appearing that the allegations of the petition do not show a right to review under Section 871-38, General Code or a right to a writ as prayed for, or other relief, the motion filed by the defendant to strike out various parts of the petition is now treated as a demurrer to the petition and it is ordered and adjudged that said demurrer be, and

the same hereby is sustained for the reasons stated in the opinion rendered in this case.

It is further ordered that plaintiff be allowed twenty days to plead further. J 37—368

ORDER DENYING APPLICATION FOR REHEARING

29746

Wednesday, February 9, 1944.

Upon consideration of the application for rehearing herein, it is ordered by the Court that rehearing be, and the same hereby is, denied. Plaintiff allowed twenty days to plead from this date. J 37—386

[fols. 133-134] FINAL JUDGMENT

29746

Wednesday, July 19, 1944.

Appeal from The Industrial Commission.

This cause came on to be heard upon the demurrer to the petition and the amendment thereto filed originally in this Court, and was argued by counsel. On consideration whereof, it is ordered by the Court that said demurrer be and the same hereby is sustained for the reasons stated in the opinion rendered in this case. And the plaintiff herein, Copperweld Steel Company, not desiring to plead further it is ordered and adjudged that final judgment be, and the same hereby is, rendered in favor of defendant, The Industrial Commission of Ohio.

It is further ordered that the plaintiff pay the costs herein, taxed at $—.

Ordered, That a copy of this entry be certified to The Industrial Commision of Ohio. J 37—498

[fol. 135] Clerk's Certificate to foregoing entries omitted in printing.

[fol. 136] [File endorsement omitted]

IN THE SUPREME COURT OF OHIO

[Title omitted]

STIPULATION FOR TRANSCRIPT OF RECORD—Filed October 17, 1944

It is hereby stipulated and agreed by and between the parties by their counsel that the Clerk of the Supreme Court of Ohio shall prepare and certify a transcript of the record and proceedings herein to be filed in the Supreme Court of the United States, pursuant to the appeal heretofore allowed herein, and shall include therein the following (showing date of filing or entry in each case):

Petition and Statement of Interested Parties and Counsel.
Motion to Strike and Brief in Support of Motion.
Brief in Opposition to Motion to Strike.
Opinion of the Court rendered January 19, 1944.
Journal Entry of January 19, 1944, Sustaining (Journal Entries). Motion Treated as a Demurrer.
Application for Rehearing.
Journal Entry of February 9, 1944, Overruling Application for Rehearing (Journal Entries).
Amendment to Petition.
Demurrer to Petition and Amendment and Brief in Support of Demurrer.
Brief in Opposition to Demurrer.
Opinions of the Court rendered July 19, 1944 (both majority and dissenting).
Journal Entry of July 19, 1944, Sustaining Demurrer and Entering Final Judgment (Journal Entries).
[fol. 137] Notice of Appeal and Application for Stay of Execution.
Journal Entry Granting Stay of Execution (Journal Entries).
Bond with approvals endorsed thereon (the Power of Attorney of J. R. Warner, Attorney-in-Fact, may be omitted).
Petition for Appeal.
Assignment of Errors.
Statement in Support of Jurisdiction.
Order Allowing Appeal.

Original Citation on Appeal and Acknowledgment of Service.

Service and Notice under Rule 12, Paragraph 3, with Acknowledgment of Service.

Transcript of Docket Entries with dates thereof, other than those to be omitted as stated below.

This Stipulation.

Your Certificate.

The following may be omitted:

Precipe for Summons, Summons and Return of Service.

All motions and applications for extension of leave to plead or of time for filing briefs, and separate entries thereon.

Notices and Proofs of Service (except as otherwise specifically designated or required).

Verifications.

Unnecessary repetition of captions and other formal parts.

Dated October 16, 1944.

Robert G. Day, Attorney for Plaintiff. Thomas J. Herbert, Attorney General. Robert E. Hall, Assistant Attorney General; Attorneys for Defendant.

[fols. 138-139] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 140] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed Nov. 29, 1944

Appellant states that it adopts its Assignment of Errors as its statement of points to be relied upon in this court, to the same extent as though fully repeated herein.

Appellant further designates the parts of the record listed below, which it thinks necessary for the consideration of the points relied upon, to-wit:

1. Petition.
2. Motion to Strike.
3. Opinion Rendered January 19, 1944.
4. Journal Entry of January 19, 1944, sustaining Motion treated as a Demurrer.

5. Application for Rehearing.
6. Journal Entry of February 9, 1944, Overruling Application for Rehearing.
7. Amendment to Petition.
8. Demurrer to Petition and Amendment.
9. Opinions Rendered July 19, 1944 (both Majority and Dissenting).
[fol. 141] 10. Journal Entry of July 19, 1944, Sustaining Demurrer and Entering Final Judgment.
11. Notice of Appeal and Application for Stay of Execution.
12. Journal Entry Granting Stay of Execution.
13. Petition for Appeal.
14. Assignment of Errors.
15. Statement in Support of Jurisdiction.
16. Order Allowing Appeal.
17. Citation on Appeal and Acknowledgment of Service.
18. Service and Notice under Rule 12, Paragraph 3.
19. Transcript of Docket Entries (with dates thereof).
20. Stipulation for Transcript of Record.
21. Certificates of the Clerk of the Supreme Court of Ohio.
22. This Statement and Designation.

Robert G. Day, Henry H. Hoppe, Attorneys for Appellant.

Frank R. S. Kaplan, E. P. McHugh, Jr., Hoppe, Day & Ford, Of Counsel.

[fol. 142] Acknowledgment of Service

Service and receipt of a copy of the foregoing Statement of Points to be Relied Upon and Designation of Parts of Record to be Printed is hereby acknowledged this 24 day of November, 1944.

Thomas J. Herbert, Attorney General; Robert E. Hall, Assistant Attorney General, Attorneys for Appellees.

[fol. 142a] [File endorsement omitted.]

[fol. 143] SUPREME COURT OF THE UNITED STATES

ORDER POSTPONING FURTHER CONSIDERATION OF THE QUESTION OF JURISDICTION—January 2, 1945

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court in this case is postponed to the hearing on the merits.

Endorsed on Cover: File No. 49137. Ohio Supreme Court, Term No. 684. Copperweld Steel Company, Appellant, vs. Industrial Commission of Ohio. Filed November 15, 1944. Term No. 684 O. T. 1944.